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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 79-85

DAVIDSON SUPPLY COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI
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 APPEALS FOR THE FOURTH CIRCUIT**

DAVIDSON SUPPLY COMPANY petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The Federal Communications Commission ("FCC") released FCC Order No. 78-267, 68 FCC 2d 89, on May 3, 1978. FCC Order No. 78-267 is reproduced as Appendix A hereof. On April 19, 1979, the Court of Appeals for the Fourth Circuit rendered an unpub-

lished *per curiam* opinion, which is reproduced as Appendix B hereof.

JURISDICTION

The opinion of the Court of Appeals was entered on April 19, 1979. A petition for rehearing was denied by Order of the Court of Appeals entered on May 23, 1979. This Order is reproduced as Appendix C hereof. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should certiorari be granted to review the holding of the Court below that the promulgation and enforcement of FCC Order No. 78-267 does not deny Petitioner the equal protection of the laws guaranteed by the Fifth Amendment of the Constitution of the United States?

2. Should certiorari be granted to review the holding of the Court below that the action of the FCC in adopting FCC Order No. 78-267 and prohibiting Petitioner from reselling its used 23-channel CB radios was neither arbitrary nor capricious and does not constitute an abuse of discretion by the FCC in violation of standards established by Congress to regulate action by federal agencies in 5 U.S.C. §706, the Administrative Procedure Act?

3. Should certiorari be granted to review the holding of the Court below that the application of FCC Order

No. 78-267 to Petitioner does not constitute an unjustifiable taking of private property without just compensation in violation of the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The Fifth Amendment of the Constitution of the United States provides, in part, that no person shall "... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

5 U.S.C. §706(a portion of the Administrative Procedure Act) provides in pertinent part:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . ."

21 C.F.R. §1030.10 (a) provides as follows:

"*Applicability.* The provisions of this standard are applicable to microwave ovens manufactured after October 6, 1971."

40 C.F.R. §86.077-1 provides as follows:

"The provisions of this subpart are applicable to 1977 and later model year new gasoline-fueled and Diesel light-duty vehicles, 1977 and later model year new gasoline-fueled and Diesel light-duty trucks and 1977 and later model new gasoline-fueled and Diesel heavy-duty engines.

47 C.F.R. §15.59 (g) provides as follows:

"The marketing of non-certificated CB receivers shall be terminated not later than January 1, 1978."

47 C.F.R. § 95.641 (c) (6) provides as follows:

"No CB transmitter type accepted pursuant to an application filed prior to September 10, 1976 shall be marketed on or after January 1, 1978."

STATEMENT OF THE CASE

Petitioner is a North Carolina corporation with a principal place of business in Greensboro, Guilford County, North Carolina, and is a wholesale distributor and retailer of sporting goods and electronic equipment, including citizens band transceivers. For purpose of this Petition, citizens band transceivers will be referred to as "CB radios."

For some time prior to January 1, 1978, Petitioner sold at wholesale and retail a large volume of 23-channel CB radios. In connection with Petitioner's established policy of guaranteeing customer satisfaction, Petitioner accepts return of defective 23-channel CB radios. In the case of consumers, it either refunds the customer's money or exchanges the returned merchandise for new 23-channel CB radios from stock. In the case of dealers, Petitioner accepts

return of the defective 23-channel CB radios and issues credit for such CB radios. After receiving defective CB radios from customers or dealers, Petitioner then returns the 23-channel CB radios to the manufacturer for repair. After repair, the 23-channel CB radios are then returned to Petitioner to be merchandised by Petitioner as used 23-channel CB radios.

During the summer and fall of 1976 and during 1977, the FCC promulgated various orders and regulations prohibiting the "marketing" of 23-channel CB radios after January 1, 1978. See 47 C.F.R. §15.97 (g) and 47 C.F.R. §95.641 (c) (6), *supra*, at page 4. On January 24, 1978, Petitioner filed a petition with the FCC requesting that Petitioner be permitted to resell the used CB radios sold by Petitioner prior to January 1, 1978 but returned by customers or dealers after January 1, 1978 for exchange or refund. Petitioner requested a waiver of the January 1, 1978 sales cut-off date as it applied to used 23-channel radios returned for refund or repairs or, in the alternative, a clarification that the terms "marketed" and "marketing" as used in 47 C.F.R. §15.59 (g) and 47 C.F.R. §95.641 (c) (6) did not apply to the resale of used 23-channel CB radios returned by customers for repair or refund. In its Order No. 78-267, which was released on May 3, 1978, the FCC stated that to allow Petitioner to resell its used 23-channel CB equipment would "... fly in the face of the Commission's decision to remove interference cable equipment from the marketplace at the earliest possible time", *Infra*, at page 8a, and denied Petitioner's petition.

Petitioner invoked the jurisdiction of the Fourth Circuit Court of Appeals pursuant to 47 U.S.C. §402 (a) and 28 U.S.C. §2341, *et seq.* (more particularly 28

U.S.C. §2342 (1) and 28 U.S.C. §2344) for review of FCC Order No. 78-267. While the review by the Fourth Circuit was pending, the FCC denied a Petition for Reconsideration of FCC Order No. 78-267.

On April 19, 1979, the Fourth Circuit entered an unpublished, *per curiam* opinion denying Petitioner's Constitutional and statutory challenges to FCC Order No. 78-267.

REASONS FOR GRANTING THE WRIT

This Petition raises substantial and important questions concerning bureaucratic usurpation of rights guaranteed to Petitioner under the Fifth Amendment of the Constitution and the Administrative Procedure Act. No precedent at all exists for the action attempted by the FCC against Petitioner in this case: namely, a prohibition of *resale* of a *used* non-hazardous consumer product. This Petition will also show that the FCC's position is totally illogical and inconsistent and that the granting of the relief sought by Petitioner will in no way offend the FCC's objective of removing interference-prone 23-channel CB radios from the marketplace at the earliest possible date. Furthermore, in view of the fact that the FCC continues to permit all new and used 23-channel CB radios to be given away without restriction, to arbitrarily prohibit Petitioner from reselling its used 23-channel CB radios, as does the FCC in Order No. 78-267, does nothing to expedite the removal of such units from the marketplace and constitutes an unnecessary and unreasonable violation of Petitioner's rights under both the Fifth Amendment

and the Administrative Procedure Act.

In FCC Order No. 78-267, the FCC decreed that to allow Petitioner to resell its used 23-channel CB radios would " . . . fly in the face of the Commission's decision to remove interference capable equipment from the marketplace at the earliest possible time." According to the arbitrary guidelines established by the FCC, however, Petitioner may give away *all* of its 23-channel CB radios, either new or used models, as door prizes or gifts. To quote a portion of FCC Public Notice No. 96235, dated January 30, 1978:

"May a 23 channel radio be given away?

"Yes, within certain limits. The Commission will not prohibit the giving away of a 23 channel radio if the transaction is a genuine gift. However, these 23 channel CB's must have been purchased prior to January 1, 1978 since the sale of this equipment after that date is prohibited even if the purchaser intends to give away the radio. As examples, the Commission would not prohibit the following types of give aways:

"(a) An individual making a gift of a 23 channel CB to a family member, friend, or charity.

"(b) The giving away of 23 channel radios as 'door prizes'.

"(c) A store giving away 23 channel radios to the first ten people who entered the store on a given day."

Petitioner is thus in the position of being told the 23-channel CB radios it presently owns create so much interference that they cannot be sold, but not to worry because the offending radios may still be *given away* to the general public. Such a position by the FCC is

illogical and inconsistent. The interference capability of a used 23-channel CB radio is not diminished in any way whatsoever by the fact that Petitioner gives it away rather than sells it. Once in a consumer's hand, a used 23-channel CB radio will create the same amount of interference irrespective of whether the consumer purchased the unit or received it as a gift. Stated another way, the prohibition by FCC Order No. 78-267 of the resale of Petitioner's used 23-channel CB radios does nothing to further the FCC's stated goal of removing "interference capable equipment from the marketplace at the earliest possible time." Absent a decision by the FCC that no 23-channel CB radios may be used or operated, the removal of such units from the marketplace will, as is true with other consumer goods, ultimately depend on natural attrition.

As will be discussed, *infra*, by arbitrarily and unreasonably prohibiting Petitioner from reselling its used 23-channel CB radios, FCC Order No. 78-267 constitutes a gross violation of Petitioner's rights under the Fifth Amendment and the Administrative Procedure Act which should not have been tolerated by the Court below, and which requires review by this Court.

I.

THE FOURTH CIRCUIT COURT OF APPEALS FAILED TO RECOGNIZE THAT FCC ORDER NO. 78-267 DENIES PETITIONER THE EQUAL PROTECTION OF THE LAWS BY PROHIBITING THE RESALE OF PETITIONER'S USED 23-CHANNEL CB RADIOS.

In contrast with previous governmental elimination of hazardous or otherwise undesirable consumer pro-

ducts, the FCC regulations dealing with 23-channel CB radios, 47 C.F.R. §15.59 (g) and 47 C.F.R. §95.641 (c) (6), *supra*, at page 4, go one step further: their focal point is the time of the sale of the consumer product rather than the time of manufacture as has been the case with previous similar regulations. In contrast, consider 40 C.F.R. §86.077-1, *supra*, at page 3, a part of the standards promulgated by the Environmental Protection Agency in an attempt to reduce the pollution caused by automobile exhaust systems. This regulation is geared to the year of manufacture and makes no mention of vehicles manufactured prior to the time the standards became effective. Certainly it would be both impractical and economically wasteful to prohibit the sale of used automobiles without emission controls manufactured prior to the deadline. The same could be said of a policy prohibiting the sale of used 23-channel CB radios.

Compare also the regulations of the Food and Drug Administration relating to the hazards of microwave ovens, contained in part in 21 C.F.R. §1030.10 (a), *supra*, at page 3. Once again the federal agency involved established a compliance date for the government standards based on the time of manufacture, not time of sale.

As the owner of used consumer goods which have been the subject of a change in manufacturing specifications promulgated by a federal agency, Petitioner finds itself in circumstances similar to those of the owner of an automobile manufactured prior to the pollution control standards or the owner of a microwave oven manufactured prior to the issuance of the new health regulations. Unlike the automobile owner or the microwave owner, however, under FCC Order

No. 78-267, Petitioner is prohibited from selling its used CB equipment which violates regulatory standards.

Petitioner has been unable to find a record of any other successful bureaucratic attempt to limit distribution of a major *used* consumer item. The stringent marketing restriction imposed on used 23-channel CB radios seems particularly difficult to justify in view of the fact that automobile pollution and microwave oven radiation pose potential health hazards, whereas 23-channel CB radios may cause interference with other communication units, but certainly pose no direct threat to human health.

It is well settled that the Due Process clause of the Fifth Amendment protects citizens from the arbitrary denial of Equal Protection by the Federal Government or its agencies. As the Court recently stated in *Schlesinger v. Ballard*, 419 U.S. 498 at 501, 95 S.Ct. 572 at 547, 42 L.Ed. 2d 610, (footnote 3) (1975):

"Although it contains no Equal Protection clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L. Ed. 884."

In examining a law or ruling in light of the Equal Protection clause, the courts have used two types of analyses. Where a fundamental right is involved or a suspect classification has been made, the courts require a compelling state interest to uphold the regulation. Petitioner contends that FCC Order No. 78-267 constitutes an unjustified taking of private property and therefore a denial of a fundamental right under the

Constitution. It is difficult to see how the FCC can contend that there is a compelling governmental interest in denying Petitioner the right to sell its used 23-channel radios that have been returned by customers in view of FCC Public Notice No. 96235, *supra*, at page 7, which permits the owners of new or used 23-channel CB radios to give away as many of these units as they so desire.

The other type of analysis of Equal Protection involves the minimal scrutiny test, which Petitioner also contends that FCC Order No. 78-267 cannot withstand. This test was recently enunciated in the case of *Francis v. Immigration and Naturalization Service*, 532 F. 2d 268 at 272 (2nd Cir. 1976):

"Under the minimal scrutiny test, which we consider applicable in this case, distinctions between different classes of persons 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "*Stanton v. Stanton*, 421 U.S. 7, 14, 95 S.Ct. 1373, 1377, 43 L.E. 2d 688, 694 (1975).

Under this minimal scrutiny test, there is no rational basis for treating Petitioner any differently from the holders of used automobiles or used microwave ovens. (It bears repeating that if anything, because the latter examples constitute potential hazards to human health which used 23-channel CB radios most certainly do not, used 23-channel CB radios should be regulated *less* stringently.)

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING OF THE COURT BELOW THAT FCC ORDER NO. 78-267 DOES NOT VIOLATE SECTION 706 OF THE ADMINISTRATIVE PROCEDURE ACT.

Under 5 U.S.C. §706, *supra*, at page 3, Congress mandated that a court reviewing action by a federal agency shall hold unlawful and set aside such agency action found to be " . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . " The Ninth Circuit recently held in a review under 5 U.S.C. §706 of an order by the Civil Aeronautics Board:

"Admittedly the scope of our review is narrow. See 5 U.S.C. §706. However, we may set aside agency action which is arbitrary or an abuse of discretion if 'this court should be of the opinion that the action was clearly wrong.' *Bates & Guild Co. v. Payne*, 194 U.S. 106, 109, 24 S. Ct. 595, 597, 48 L. Ed. 894 (1904). We are convinced that these orders were clearly wrong and therefore they are unenforceable." *Hughes Air Corporation v. C.A.B.*, 482 F. 2d 143, 145, (9th Cir. 1973).

Petitioner respectfully submits that the portion of FCC Order No. 78-267 prohibiting Petitioner from reselling its used 23-channel CB radios is clearly wrong and should have been declared unlawful and set aside by the Court below. The relief requested by Petitioner would, however, in no way invalidate the FCC prohibition on manufacture or sale of new 23-channel CB radios which would remain in a prohibited state.

III.

FCC ORDER NO. 78-267 CONSTITUTES AN UNJUSTIFIABLE TAKING OF PETITIONER'S PROPERTY WITHOUT JUST COMPENSATION.

It is well settled that the Fifth Amendment's restriction against taking private property without just compensation extends to personalty as well as realty and prohibits the government from unreasonably limiting a person's use and enjoyment of his property. *King v. U.S.*, 427 F. 2d. 767, 192 Ct. Cl. 548 (1970). This Court held in *U.S. v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L. Ed. 311 (1945):

"Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

Unquestionably, government may use the police power to regulate individual liberties for the benefit of all. loss to the individual must, however, be balanced against the gain to society as a whole. Since the used 23-channel CB radios are in existence and will undoubtedly return to circulation and be used by consumers in one form or another, society will not benefit at all by the FCC prohibition on resale of these units. A 23-channel CB radio given away by Petitioner will create just as much interference as one that is sold. Although FCC Order No. 78-267 does not confer any measurable benefit on society as a whole, it does penalize Petitioner both economically, by prohibiting resale of its used 23-channel CB radios, and constitutionally, by denying to Petitioner the aforementioned

Fifth Amendment rights.

To so limit Petitioner's use of its property with no resultant benefit whatever to society clearly constitutes an unreasonable "taking" of Petitioner's property without just compensation. Such a violation of Petitioner's rights under the Fifth Amendment must not be sanctioned. Unless certiorari is granted by this Court, this violation of Petitioner's constitutional rights will continue unremedied.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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Dated: July 10, 1979

APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 78-267
84868

In the Matter of

Petitions to extend the January 1, 1978
marketing cut-off date for *used*
23-Channel CB radios

ORDER

Adopted: April 20, 1978 Released: May 3, 1978

By the Commission: Commissioner White Dis-
senting and issuing a Statement.

1. The Commission has before it two petitions to waive Sections 15.59(g) and 95.641(c)(6) of our rules which specify that marketing of 23-channel CB radios¹ shall be terminated not later than January 1, 1978. The

¹ As used herein, the term 23-channel CB radio refers to a CB radio (transceiver) that does not meet the new technical specifications that were adopted by the Commission on July 27, 1976 and went into effect on September 10, 1976. All CB radios manufactured to meet these new standards have a 40-channel capability.

petitions request waiver for *used* 23-channel CB radios. See Appendix.

2. One petition was filed on January 30, 1978 by Davidson Supply Co. and was put on Public Notice January 31, 1978 (FCC #96402). The second petition was filed on February 3, 1978 by the Colorado Pawn Brokers Association and was put on Public Notice on February 14, 1978 (FCC #96960). In response to these Public Notices a comment was received on February 21, 1978 from Pathcom, Inc., supporting the waiver requested in the petitions. A letter was also received on February 7, 1978 from Capitol Loans which asks for special permission to dispose of the CB radios that Capitol has on hand which Capitol is holding as pledges on loans.²

3. The Commission established the new technical standards for CB radios and also established cut-off dates for the manufacture and marketing of 23-channel

² A petition from the Heilig-Meyers Co. and a comment from the Texas Pawnbrokers Assn. were received too late to permit detailed treatment in this Order. Heilig-Meyers, a merchandiser in several states on the East Coast seeks the same relief sought by Davidson. The Texas Pawnbrokers filing and supplement is essentially a petition asking for the same relief sought by the Colorado Pawnbrokers Association.

CB radios in several actions in 1976.^{3 4} The Commission has also on three separate occasions ^{5 6 7} considered the question of waiver of the January 1, 1978 marketing cut-off date. With the exception of hand held CB radios⁶ which presented exceptional

³ Revised technical standards for CB transmitters and the transmitter part of a CB radio (transceiver) were adopted in Docket 20120, 2nd Report & Order adopted July 27, 1976; released July 29, 1976 (41 FR 32678; 60 FCC 2d 762) and Memorandum Opinion and Order adopted October 18, 1976, released October 28, 1976 (41 FR 47445; 62 FCC 2d 646). These revised technical standards went into effect on September 10, 1976.

⁴ Technical standards were imposed on CB receivers and the receiver part of a CB radio (transceiver) in Docket 20746, 1st Report and Order adopted July 27, 1976, released August 4, 1976 (41 FR 32590; 60 FCC 2d 687) and Memorandum Opinion and Order adopted October 18, 1976, released October 28, 1976 (41 FR 47442; 62 FCC 2d 623). These new receiver standards went into effect on September 10, 1976.

⁵ *In the Matter of manufacture and sale of 23-channel class D citizens band equipment that was type accepted prior to September 10 1976.* Order adopted August 1, 1977 denies request to establish a cut-off for importation and reaffirms the January 1, 1978 marketing cut-off date, FCC 77-562. Simultaneously, the Commission on August 1, 1977 issued a Public Notice (FCC 77-563) cautioning and reminding manufacturers and importers that manufacture of 23-channel CB radios must be terminated not later than August 1, 1977 and marketing not later than January 1, 1978.

⁶ *In the Matter of petitions to extend the sales cut-off date for certain CB radios.* Order adopted August 24, 1977 extended the sales cut-off date to hand held CB radios (as defined in Paragraph 12 of the Order) and denied an extension of sales cut-off for all other (23 channel) CB radios, FCC 77-586; 66 FCC 2d 139.

⁷ *In the matter of petitions to extend the January 1, 1978 sales cut-off date for 23-channel CB radios and CB receivers/converters.* Order adopted 11/9/77 denied the petitions, FCC 77-768 66 FCC 2d.

circumstances, the Commission has denied all requests for waiver and has consistently maintained that marketing of 23-channel CB radios must be terminated not later than January 1, 1978. Our most recent denial (Order of November 9, 1978) was affirmed on review by the court.⁸

The Davidson Petition

4. Davidson explains that it sells CB radios at wholesale and at retail and that in 1977 it had sold 17,129 40-channel units and 89,933 23-channel units (Davidson Exhibit A). In connection with its established policy of guaranteeing customer satisfaction, Davidson states that it accepts return of defective equipment and either refunds the customer's money or exchanges the returned merchandise for new equipment from stock. In the case of dealers, Davidson accepts return of defective merchandise and issues a credit for such equipment. Davidson then ships such returned equipment to the manufacturer for repair. Upon repair the equipment is returned to Davidson and is sold as used equipment. In a set of exhibits attached to its petition Davidson shows that during 1977 490 40-channel units and 1741 23-channel units were returned to the manufacturer for repair, and that as of December 31, 1977, 140 40-channel and 309 23-channel units had not yet been returned to Davidson. To allow it to continue its practice of exchanging and repairing defective 23-channel CB radios, Davidson requests the Commission either to waive the January 1, 1978 marketing cut-off date or to construe the term "marketing" not to apply to such used equipment.

⁸ Arthur Fulmer, Inc., v. FCC, D.C. Cir. No. 77-2064.

The Colorado Pawnbrokers Petition

5. The Colorado Pawnbrokers Association represents 39 licensed pawnbrokers in the State of Colorado which constitutes 80% of the pawnbrokers in that state. Under Colorado law, the petitioner explains, no pawnbroker shall sell any pledge in his possession until six months after maturity of the loan or until the pledgor has been given ten days notice by mail of the time within which the pledge shall be redeemed. The petition explains that data collected from the Association members shows that they hold 749 23-channel CB radios under pledge which are not yet available to be sold. They also hold 376 23-channel CB units that have become available for sale since January 1, 1978.

6. The petition explains further that experience indicates that about 80% of the pawned CB radios would ordinarily be redeemed by their owners. However, it appears that Public Notice of the FCC Ruling⁹ is causing a substantial reduction in the number of redemptions. Estimating that \$20 was advanced on each CB radio that was pawned, petitioner states that the units now or soon to be available for sale represent an out of pocket loss of \$22,500.00

7. Petitioner explains that the advance of money by a pawnbroker is not a typical loan. Such a loan has no maturity date and continues indefinitely as long as interest is paid and the pledge is not redeemed. The

⁹ The petition does not indicate which FCC Ruling is referred to. It may be assumed that the term FCC ruling encompasses the several FCC Orders that established the new technical specifications and the manufacturing and marketing cut-off dates for 23-channel CB radios, and the Orders that denied waiver or extension of the marketing cut-off date.

pawnbroker has no control over the maturity of the loan and is powerless to require new security. If the borrower chooses not to repay his loan and abandons the pledged property, the borrower has no further obligation to the pawnbroker and the pawnbroker has no further recourse against the borrower. The pawnbroker's only way to recover the money he loaned is to sell the unredeemed pledge.

8. Referring to the Commission's Order of November 9, 1977,¹⁰ petitioner alleges that the reference to "adequate notice" in Paragraph 9 of that Order cannot appropriately be applied to pawnbrokers, since they do not fit the description of parties "involved in CB marketing" and that granting the requested waiver would not constitute unwarranted favoritism on behalf of pawnbrokers in view of the unique characteristics of the pawnbroking business and the legal restrictions under which pawnbrokers operate.

The Pathcom Filing

9. Pathcom urges the Commission to grant the waiver requested by Davidson and extend this waiver to all the retailers who follow the business practice described by Davidson in its petition. Pathcom points out that in many states, a retailer is required to refund the cost of inoperable equipment and in almost states a consumer seeking redress from small claims court action effectively force the retailer to refund money.

10. Pathcom recognizes that the intent of the "new

¹⁰ See footnote 7 above.

type of regulation"¹¹ was to stop the continued proliferation of interference causing devices. It argues, however, that a used CB radio is already on the air and as such its repair does not constitute a new potential source for interference. Finally, Pathcom argues, that denial of the instant petitions will work an additional hardship particularly on the smaller retailers who, having suffered by not being able to sell after January 1, 1978 ¹² the new 23-channel CB radios they had in stock, will be compelled to take further losses if they are not permitted to sell as used equipment the repaired 23-channel CB radios that had been taken back from their customers under warranty.

Commission Decision

11. Let us turn first to Davidson. The business practice of taking back inoperable equipment, returning such equipment to the manufacturer for repair and subsequently selling this equipment as "used equipment" is precisely the business practice described by Montgomery Ward in its petition that was considered and denied in the Commission's Order of August 24, 1977 ¹³.

12. Davidson is silent on the interference potential of the used 23-channel CB radios it is seeking to sell after January 1, 1978. However, Pathcom in sup-

¹¹ Presumably the Commission's new technical standards for CB radios and the manufacturing and marketing cut-off dates for 23-channel CB radios.

¹² See footnote 7 above.

¹³ See footnote 6 above.

porting Davidson, argues that the used equipment is already on the air and therefore does not constitute a new potential source of interference. The Commission cannot agree with Pathcom. A transaction in which Davidson (or for that matter any other retailer) takes back a defective piece of equipment, has it repaired and returns the repaired equipment to the purchaser, is not a sale that is covered by our marketing cut-off regulation. Similarly, the exchange of a working unit for a defective unit would not be considered marketing. This interpretation is set out in Paragraph 10 of our Public Notice of January 30, 1978: *Marketing of 23-channel CB radios*. (FCC #96235)¹⁴

13. However, where the dealer takes back a defective 23-channel unit, has it repaired and then seeks to sell it as used equipment to a new purchaser, such a transaction is considered marketing and is prohibited after January 1, 1978. This last transaction does constitute a new potential source of interference, Pathcom's assertion to the contrary, and allowing the sale of such a piece of used equipment would fly in the

¹⁴ Item 10 of this Public Notice states:

If a customer purchases a 23-channel radio before January 1, 1978 and the radio is defective, can the dealer exchange the radio or repair it?

Both of these actions would be allowable. Repairs to the radios are not prohibited. In the case of an exchange program to supply the customer with a working radio in place of a defective unit, this would not be considered marketing by the Commission as the customer would still be in possession of the same type of unit that was originally purchased before the cut-off date. However, the dealer would not be permitted to sell the unit he took in exchange.

face of the Commission's decision to remove interference capable equipment from the market place at the earliest possible time.

14. The Colorado Pawnbrokers argue that they are caught in a bind between the Commission's regulation that prohibits the sale of an abandoned pledge (a 23-channel CB radio) to redeem the loan that had been made thereon and the Colorado state law that prohibited the timely sale of such pledge. Moreover, they argue that the pawnbrokers did not receive adequate notice. The pawnbrokers argue that they do not fit the description of parties "involved in CB marketing" and cannot be expected to be knowledgeable of trade publications in which the ban against marketing of pre-September 10, 1976 was discussed.

15. The Commission is sympathetic to the pawnbroker's dilemma but cannot accept the argument that it is due to lack of notice concerning the marketing cut-off date. Our Orders of August 1976¹⁵ which established this cut-off date were properly publicized in the Federal Register in accordance with established federal rule making procedures¹⁶ and parties affected are charged with notice¹⁷. Moreover, as we pointed out in Paragraph 9 of our Order of November 9, 1977,¹⁸ these rules were widely publicized not only in trade publications but also in publications of general circulations.

¹⁵ See footnotes 3 and 4 above.

¹⁶ 5 U.S.C. 552(D) and (E).

¹⁷ 44 U.S.C. 1507.

¹⁸ See footnote 7 above.

16. While it may be technically correct that pawnbrokers are not "involved in CB marketing" as alleged, it would appear that a pawnbroker must have a good knowledge of the market value of a CB radio (or of any other item that he accepts as security for a loan) if he is to succeed in his business. It can be expected therefore that a pawnbroker would take whatever measures are available under the law to protect his loan. In this connection we note that the 1973 Colorado Revised Statutes 12-56-112 set out a procedure for the pawnbroker to terminate a loan.

17. The Colorado Pawnbroker's and Davidson's arguments for relief appeared to be largely based on financial hardship and economic loss. We have not been persuaded by similar arguments in our consideration of earlier requests for waiver or extension of the marketing cut-off date.¹⁹ Nor are we persuaded in this instance. In setting the marketing cut-off date at January 1, 1978 we recognized that some hardship and financial loss would occur. We must reiterate that:

The dates chosen [August 1, 1977 for termination of manufacture and January 1, 1978 for termination of sales] represented however what was and is believed to be a reasonable compromise between the alternatives of providing the lowest level of interference potential on the one hand and a *total loss or waste of untold dollars of inventory of components, parts and finished sets on the other.* (underlining supplied)²⁰

¹⁹ See footnotes 5, 6 and 7 above.

²⁰ FCC Order of August 1, 1978 at Paragraph 5. See footnote 5 above.

18. The need to reduce the potential interference to television, the land mobile service, and others is overriding. Neither of the petitioners had challenged this need. The loss asserted to be sustained by petitioners is no greater and in many cases less than that claimed by earlier petitioners who were denied. The Commission must insist therefore that the January 1, 1978 marketing cut-off date for 23-channel CB radios must stand.

19. In view of the above the petitions by Davidson, Heilig-Meyers and the Colorado Pawnbrokers ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Appendix

APPENDIX

Appendix

Petition for waiver

Davidson Supply Co., petition filed January 30, 1978
attorney Kenneth R. Keller of Tuggle, Duggins,
Meschan, Thornton & Elrod, P.A., 228 West
Market St., Greensboro, N. Carolina 27402

Colorado Pawnbrokers Assn., petition filed February
3, 1978 by attorney Wilton W. Cogswell, III,
Mining Exchange Bldg., Colorado Springs,
Colorado 80903

Heilig-Meyers Co., petition filed March 24, 1978 by
attorney Larry M. Goodall of McGuire, Woods &
Battle, Ross Building, Richmond, Virginia 23219

Texas Pawnbrokers Association, comment filed Feb-
ruary 24, 1978 with supplement on April 7, 1978 by
attorney Stephen A. Goldberg of Hogan &
Hartson, 815 Connecticut Avenue, N.W., Washing-
ton, D.C. 20006. (These filings are labeled comment
and supplement to comments, but for all practical
purposes, these filings constitute a petition to
exempt CB radios held by members of the Texas
Pawnbrokers Association from the January 1, 1978
marketing cut-off date.

Comment

Pathcom, Inc., 24049 South Frampton Avenue, Har-
bor City, California 90710; letter dated February
14, 1978.

Capitol Loans, 774 Poplar Avenue, Memphis,
Tennessee 38105; letter dated February 4, 1978
(Although not strictly a comment in this pro-

ceeding, this letter essentially asks for the same
relief requested by the Colorado Pawnbrokers
Association).

DISSENTING STATEMENT OF COMMISSIONER MARGITA E. WHITE

IN RE: Order Denying Extension of Marketing
Cut-Off Date for Used CB Radios

I dissent to the majority's decision to deny an
extensio marketing cut-off date for used 23-Channel
CB radios for the same reasons that I stated in my
dissent to the original order denying an extension of the
marketing cut-off date for new CB equipment. See my
dissenting statement *In the Matter of Petitions to
Extend the January 1, 1978 Sales Cut-Off Date for 23-
Channel CB Radios and CB Receiver/Converters*,
FCC 77-768 (released November 30, 1977).

1b

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1308

Davidson Supply Co.,

Petitioner,

versus

Federal Communications
Commission and United
States of America,

Respondent.

On Petition for Review from Order dated May 3, 1978
by the Federal Communications Commission.

Argued March 14, 1979 Decided April 19, 1979

Before HAYNSWORTH, Chief Judge, WINTER and
HALL, Circuit Judges.

David F. Meschan (Kenneth R. Keller on brief) for
Petitioner; C. Grey Pash, Jr., Federal Communica-
tions Commission (Robert R. Bruce, General Counsel,
Daniel M. Armstrong, Associate General Counsel,
Federal Communications Commission; John H.

Shenefield, Assistant Attorney General, Barry Grossman, Peter De La Cruz, Dept. of Justice on brief) for Respondents.

PER CURIAM:

After having adopted standards for citizen band radios which would avoid interference with other radio and television reception, the Commission entered an order banning the construction of offending radios after August 1, 1977, and the sale of such radios after January 1, 1978. The plaintiff in this action unsuccessfully sought a waiver of the prohibition of the sale of offending radios.

After consideration of the record, briefs, and oral arguments, we conclude that neither of the Commission's orders nor its denial of a variance were in violation of the Constitution or of the Administrative Procedure Act.

AFFIRMED.

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 78-1308

DAVIDSON SUPPLY CO.,

Petitioner,

versus

**FEDERAL COMMUNICATIONS
COMMISSION AND UNITED
STATES OF AMERICA,**

Respondents.

ORDER

Upon consideration of the petition for rehearing, and with the concurrence of Judge Winter and Judge Hall,

IT IS ORDERED that the petition for rehearing be, and it hereby is, denied.

/s/ _____

Chief Judge, Fourth Circuit

May 18, 1979

No. 79-85

Supreme Court, U.S.
FILED

SEP 14 1979

MICHAEL BODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVIDSON SUPPLY COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

ROBERT R. BRUCE
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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-2b) is unreported. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 1a-13a) is reported at 68 F.C.C. 2d 89.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1979. A timely petition for rehearing was denied on May 18, 1979 (Pet. App. 1c). The petition for a writ of certiorari was filed on July 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission denied petitioner the equal protection of the laws, acted arbitrarily, or took petitioner's property without just compensation, by refusing to grant petitioner a waiver from regulations prohibiting the sale of radios that do not comply with minimal technical standards.

STATEMENT

In 1976, the Federal Communications Commission adopted regulations governing the technical performance of radios used in the Citizens Band Radio Service. See generally, 47 C.F.R. Part 95. The regulations sought to reduce the interference created by citizens band ("CB") radios for television reception and other radio communications by establishing certain minimal technical standards for radio equipment.¹ The regulations prohibited the sale of noncomplying radios as of January 1, 1978, and prohibited the manufacture of noncomplying radios as of August 1, 1977. See 47 C.F.R. 15.59, 95.641(c)(6). The effective date of the regulations was thus

¹From 1974 to 1979 the number of individuals licensed by the FCC to operate citizens band radios increased from fewer than 800,000 to more than 14,000,000. See *Second Report and Order*, 60 F.C.C. 2d 762, 41 Fed. Reg. 32678 (1976); *Memorandum Opinion and Order*, 62 F.C.C. 2d 646, 41 Fed. Reg. 47445 (1976); *First Report and Order*, 60 F.C.C. 2d 687, 41 Fed. Reg. 32590 (1976); *Memorandum Opinion and Order*, 62 F.C.C. 2d 623, 41 Fed. Reg. 47442 (1976).

The regulations apply to citizens band radios which do not meet the minimum radiation-reduction standards adopted by the Commission. Because no 23-channel citizens band radios comply with these standards, the Commission's orders and the petition, for the sake of convenience, speak in terms of the regulations' applicability to "23-channel CB radios." When it adopted the regulations to reduce interference, the Commission also increased the number of available channels to 40. Thus, new models developed to comply with the regulations operate on the 17 additional channels.

delayed 18 months to provide sellers with a reasonable period in which to dispose of existing inventory. The regulation did not distinguish in any way between new and used equipment which failed to meet the minimal technical standards.

Petitioner and several other persons requested a delay of the effective date of the regulation prohibiting the sale of noncomplying radios. The Commission denied the request in November 1977, and that order was affirmed by the District of Columbia Circuit. *Petitions to Extend Cut-off Date*, 66 F.C.C. 2d 1021, aff'd, *Arthur Fulmer, Inc. v. FCC*, 569 F. 2d 159 (D.C. Cir. 1977).² Petitioner did not participate in the judicial review proceeding.

In January 1978, after the regulations prohibiting the sale of noncomplying radios became effective, petitioner again sought a waiver. Petitioner wished to continue its practice of accepting defective CB equipment for exchange or refund, repairing the equipment, and then selling it to new buyers as used equipment (Pet. App. 4a).

The Commission again denied petitioner's request, noting that it had previously denied a similar waiver request by Montgomery Ward (Pet. App. 7a). Petitioner did not question the need for the regulations and the Commission concluded that no fact had been shown that

²The Commission denied several other requests for waiver or delay of the effective date because the regulations had provided ample notice of their requirements and the effective date had been timed to minimize any adverse impact; because the severe interference caused by CB radios required that implementation not be delayed further; and because the Commission found that the waiver requests were not factually justified. See *Waiver of Chassis Radiation Standard*, 62 F.C.C. 2d 544 (1977); *Petitions to Extend Sale Cut-Off Date*, 66 F.C.C. 2d 139 (1977).

materially differentiated petitioner's request for a waiver from others that had been denied (Pet. App. 10a-11a). The primary purpose of the new technical standards for CB radios was to reduce the interference for other communications. This, the Commission concluded, would be undermined if petitioner's practices continued, because the sale of the repaired equipment would create "a new potential source of interference" (Pet. App. 8a-9a).

Petitioner sought review of the Commission's decision, and the court of appeals affirmed (Pet. App. 1b).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the other courts of appeals. Further review by this Court is therefore unwarranted.

1.a. The Commission has broad authority to regulate the manufacture and sale of radio equipment that is capable of causing harmful interference with radio communications. 47 U.S.C. 302a.³ The regulations prohibiting the manufacture and sale of radios that fail to satisfy minimal technical standards were designed by the Commission to prevent undue radio interference while minimizing any burden placed on manufacturers, sellers or users of citizens band radios. The Commission's determination that these regulations are "consistent with the public interest, convenience, and necessity" (47 U.S.C. 302a(a)) is entitled to considerable deference because this judgment "necessarily involves deductions based on the expert knowledge of the agency." *FCC v. National*

³In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969), the Court noted that government regulation of radio communication is necessary else, "because of the cacaphony of competing voices, none * * * could be clearly and predictably heard."

Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978), quoting, *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

b. Petitioner did not challenge the Commission's rules directly. Instead, petitioner requested the Commission to grant it a waiver from the prohibition on sales of nonconforming equipment. This request was properly denied by the Commission.

An applicant for a waiver of agency regulations bears a heavy burden of demonstrating that a waiver is warranted. *Sudbrink Broadcasting, Inc. v. FCC*, 509 F. 2d 418, 422 (D.C. Cir. 1974); *WAIT Radio v. FCC*, 459 F. 2d 1203, 1207, cert. denied, 409 U.S. 1027 (1972). As the Commission determined (Pet. App. 10a), petitioner failed to meet its burden in this case. Petitioner's waiver application omitted to inform the Commission when the company had acquired its inventory, the reasons why it would be exposed to liability if it did not obtain a waiver, or the extent of the financial impact on the company if the rule were not waived. The absence of such relevant and easily obtainable information was particularly significant because the Commission had denied earlier waiver requests of petitioner and others for precisely the same type of evidentiary failure (Pet. App. 10a). See *Petitions to Extend Cut-Off Date*, 66 F.C.C. 2d 1021, 1024, aff'd, *Arthur Fulmer, Inc. v. FCC*, 569 F. 2d 159 (D.C. Cir. 1977). Moreover, the Commission correctly determined that a continuance of petitioner's practice of repairing and reselling nonconforming equipment would hinder the objectives of the regulation by creating new "source[s] of interference" (Pet. App. 8a). The repair and

resale of defective, nonconforming radios would reintroduce equipment that otherwise would be eliminated from use (*ibid.*).⁴

2. Petitioner contends (Pet. 8-11) that the Commission's regulations deny petitioner the equal protection of the laws. Petitioner's theory is that the Commission may not prohibit the manufacture *and* sale of nonconforming radios because other government regulations eliminating "hazardous or otherwise undesirable consumer products" prohibit only manufacture (Pet. 8-9). This contention is insubstantial.

The "Constitution does not require things which are different in fact * * * to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). There is thus no requirement that CB equipment and other consumer products—such as automobiles (Pet. 9) — be regulated under identical regulations.

Moreover, regulatory distinctions between nonconforming CB's and other "undesirable consumer products" do not involve invidious discrimination. It is sufficient that the different treatment is rational in light of the objective of the regulation. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See also *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). In this case, the purpose of the Commission's regulation was to reduce interference caused by citizens band radios. The remedy the Commission chose was reasonable, and applies equally to all sellers of those types of radios. Its validity is not affected by the fact that other government agencies have chosen other remedies in the regulation of consumer products that do not create radio interference.

⁴The Commission's regulations do not prohibit repair of nonconforming CB radios at the owner's behest. The regulations do, however, prohibit the sale of nonconforming radios, whether new or repaired.

3. Petitioner argues (Pet. 13-14) that the regulatory prohibition against the sale of nonconforming CB equipment constitutes a taking of property without just compensation (Pet. 13-14). This contention was not raised before the Commission and may not be raised for the first time on judicial review. 47 U.S.C. 405; *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 155 (1946). In any event, the argument is devoid of merit. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122-137 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590, 593-596 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
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SEPTEMBER 1979

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